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No. 01-518

In the Supreme Court of the United States

BE&K CONSTRUCTION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Did the Court of Appeals err in holding that under *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993)?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 246 F.3d 619. The decision and order of the National Labor Relations Board (Pet. App. 28a-68a) are reported at 329 N.L.R.B. 717.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2001. A petition for rehearing was denied on June 28, 2001 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on September 25, 2001, and granted on January 4, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set out in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

Petitioner asserts that this Court's decision in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), conflicts with the later case of *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), and that *Bill Johnson's* has been, or should be, overruled in relevant part. We therefore begin with a discussion of those two decisions, before turning to the facts of this case and the decisions below.

1. *Bill Johnson's* involved enforcement of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.* Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. The rights guaranteed in Section 7 include the right to engage in concerted activity "for the purpose of * * * mutual aid or protection." 29 U.S.C. 157. The alleged unfair labor practice in *Bill Johnson's* was an employer's filing and prosecution of a state-court civil suit against employees who picketed one of the employer's restaurants. The National Labor Relations Board (Board) found an unfair labor practice in violation of Section 8(a)(1) of the Act (as well as Section 8(a)(4), 29 U.S.C. 158(a)(4)) and ordered the employer to withdraw its state-court complaint and to reimburse the employees for their expenses of defending against the suit, among other remedies. See 461 U.S. at 733-737.

In determining whether to uphold the Board's application of the NLRA, this Court balanced the Board's strong interest in stopping and remedying employer conduct that is intended to restrain employees' protected activities against two "countervailing considerations": (1) the employer's right of access to the courts under the First Amendment's Petition Clause and (2) "the States' compelling interest in the maintenance of domestic peace" through the provision of state-law civil remedies. 461 U.S. at 740-742. Reconciling those competing considerations, the Court agreed with the Board that it is an unfair labor practice under Section 8(a) for an employer "to prosecute an unmeritorious lawsuit for a retaliatory purpose," but also held that "the offense is not enjoinable unless the suit lacks a reasonable basis." *Id.* at 749. Thus, the Board may halt the prosecution of a suit that it finds to be an unfair labor practice only if the suit lacks a reasonable basis in fact or law. *Id.* at 748. If the Board is not authorized to enjoin the suit under that standard, however, it "must await the results" of the litigation. *Id.* at 749. In that situation, the *Bill Johnson's* Court explained, the Board later may find that the lawsuit violated Section 8(a)(1) and constituted an unfair labor practice "[i]f judgment goes against the employer * * * or if his suit is withdrawn or is otherwise shown to be without merit," and if the Board determines that the suit was filed in retaliation for the exercise of employees' Section 7 rights. *Id.* at 747. If the Board finds a violation of the NLRA after the lawsuit is complete, it may order any proper relief that would effectuate the policies of the Act—including ordering the employer to reimburse the employees for their attorneys' fees and other expenses of defending against the wrongful suit. *Ibid.* (citing 29 U.S.C. 160(c)).

2. *Professional Real Estate Investors* arose under the Sherman Act.[1] The Court considered the doctrine of antitrust immunity that was first articulated in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), as it applied to a claim that the filing and maintenance of a lawsuit in federal court violated the Sherman Act. See 508 U.S. at 51, 52.

In *Noerr*, the Court had interpreted the Sherman Act in light of the First Amendment right to petition. The *Noerr* Court concluded that "the Sherman Act does not prohibit * * * persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." 365 U.S. at 136-138; see also *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669 (1965) (following *Noerr*). The Court also held, however, that "application of the Sherman Act would be justified" where conduct "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." 365 U.S. at 144. In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), another antitrust case, the Court applied those principles to efforts by "groups with common interests

[1] Section 1 of the Sherman Act, 15 U.S.C. 1, provides that "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is * * * illegal." Section 2 of the Sherman Act, 15 U.S.C. 2, provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

* * * to advocate their causes" before the courts. *Id.* at 510-511.

Clarifying *Noerr's* sham exception, the Court held in *Professional Real Estate Investors* that, to be outside the protection of *Noerr* immunity from federal antitrust liability by virtue of that exception, a lawsuit must be *both* "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" *and* filed in "an attempt to interfere *directly* with the business relationships of a competitor." 508 U.S. at 60-61 (quoting *Noerr*, 365 U.S. at 144). The Court cited *Bill Johnson's* as "h[o]ld[ing] that even an 'improperly motivated' lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is 'baseless.'" *Id.* at 59. Because the *Bill Johnson's* Court had identified an "analogy" between its construction of the NLRA and *Noerr's* sham exception (see 461 U.S. at 744), the Court concluded in *Professional Real Estate Investors* that *Bill Johnson's* supported its holding that an antitrust defendant's "objectively reasonable petitioning" is entitled to *Noerr* immunity against antitrust liability, without regard to the defendant's anticompetitive motive. 508 U.S. at 59.

3. Petitioner in this case is an industrial general contractor whose employees are not unionized. Pet. App. 4a, 32a-33a. In late 1986 or early 1987, USS-POSCO Industries (USS-POSCO) awarded petitioner a contract to modernize a steel mill in Pittsburg, California. Petitioner formed a joint venture with Eichleay Constructors, Inc. (Eichleay) to perform the contract. *Ibid.*

a. In September 1987, petitioner and USS-POSCO filed a complaint in the United States District Court for the Northern District of California against a number of

construction-industry unions. Pet. App. 4a, 33a. The complaint sought damages under Section 303 of the Labor-Management Relations Act, 1947, 29 U.S.C. 187, which authorizes a private cause of action against labor organizations that engage in specified unfair labor practices. The federal-court complaint filed by petitioner and USS-POSCO alleged that the construction unions had violated Section 8(b)(4) of the NLRA, 29 U.S.C. 158(b)(4), by lobbying in support of a county ordinance addressing toxic waste emissions in an effort to delay the Pittsburg project; by filing successful collective bargaining grievances against Eichleay; by picketing and handbilling at petitioner's and USS-POSCO's premises; and by filing a state lawsuit—known as the *Pile Drivers* suit—which alleged among other things that petitioner and USS-POSCO had violated California's Health and Safety Code. See Pet. App. 33a-34a; J.A. 15-16, 21.

In July 1988, the federal district court granted summary judgment for the unions on all claims relating to their lobbying and initiation of contractual grievances. J.A. 19-20. With respect to the claim arising from the *Pile Drivers* suit, the district court concluded that further discovery was appropriate to determine whether, under *Bill Johnson's*, petitioner and USS-POSCO had established an actionable unfair labor practice. J.A. 20.

In October 1988, petitioner and USS-POSCO filed an amended complaint that alleged claims similar to those in the initial complaint, including the claims on which the district court had already granted summary judgment for the unions. See J.A. 26-27. The amended complaint also added a new claim for treble damages under Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. See Pet. App. 6a, 35a.

In May 1989, the district court granted the defendant unions summary judgment on the claim that the *Pile Drivers* suit was an unfair labor practice. The district court explained that it was undisputed that five of the defendant unions had not been parties to the *Pile Drivers* action, and the court accordingly dismissed the claim against these defendants. J.A. 24-25. Petitioner and USS-POSCO, the district court continued, had failed to cite any evidence that the *Pile Drivers* suit lacked a reasonable basis in law. Invoking the *Noerr* immunity doctrine, J.A. 25, the district court deemed that failure fatal to the entire claim that the *Pile Drivers* suit was an unfair labor practice, J.A. 26. Finally, the district court denied petitioner and USS-POSCO leave to re-allege the lobbying and grievance claims that had been dismissed with prejudice in July 1988. J.A. 27-28. The district court did, however, allow petitioner and USS-POSCO to file a revised amended complaint that was consistent with the district court's summary-judgment rulings. J.A. 28.

Petitioner and USS-POSCO filed a six-count second amended complaint. Three counts re-alleged claims that the district court had already resolved in favor of the defendant unions. Three counts alleged claims that the district court had not dismissed. See J.A. 32-33 . In August 1989, the district court struck the three previously dismissed claims and sanctioned petitioner and USS-POSCO under Fed. R. Civ. P. 11 for re-pleading these claims in violation of the court's earlier order. J.A. 33-37; see J.A. 38-42. USS-POSCO then voluntarily dismissed all of its remaining claims with prejudice. Pet. App. 7a, 38a.

Petitioner continued to pursue the suit against the unions. In June 1990, the district court entered a discovery order clarifying that, under the federal labor

laws, petitioner could not prevail on its antitrust claim if it showed only that the defendant unions cooperated with other labor organizations in an effort to maintain area wage standards and working conditions. See J.A. 43-55; see generally *United States* v. *Hutcheson*, 312 U.S. 219, 227-237 (1941) (discussing interplay of antitrust and labor laws). Petitioner conceded that its antitrust claim could not succeed under that rule. In September 1991, therefore, the district court granted the unions summary judgment on petitioner's antitrust claim. J.A. 56-57. Petitioner then voluntarily dismissed with prejudice its remaining claims (which had been pled under the Labor-Management Relations Act) and the district court entered a final judgment in favor of the unions. J.A. 58-61.

b. Petitioner appealed only the dismissal of its antitrust claims and the district court's imposition of Rule 11 sanctions. In July 1994, the United States Court of Appeals for the Ninth Circuit affirmed on the merits but reversed the Rule 11 sanctions award. J.A. 62-80. Although the court of appeals concluded (J.A. 75) that the labor laws did not immunize the unions from antitrust liability for all the activities that they allegedly undertook against petitioner, the court of appeals also held (J.A. 75-79) that the unions could claim immunity under the *Noerr* line of antitrust cases. In particular, the court of appeals held, the sham exception to *Noerr* immunity did not apply to the unions' filing of a series of legal claims against petitioner. "[M]ore than half of all the [unions'] actions as to which we know the results turn[ed] out to have merit," the court noted. J.A. 78. The unions' substantial success in their litigation against petitioner, the court of appeals concluded, "cannot be reconciled with [petitioner's] charge that the unions were filing law-

suits and other actions willy-nilly without regard to success." J.A. 78-79.[2]

The Ninth Circuit reversed the district court's award of Rule 11 sanctions against petitioner. J.A. 79-80. Petitioner's counsel asserted that petitioner had repleaded its previously dismissed claims because of a fear that petitioner otherwise could not take an appeal on these claims at the conclusion of the district court's proceedings. J.A. 79. The court of appeals held that counsel's concern, although mistaken, was not frivolous and petitioner's repetitious pleading therefore did not warrant sanctions. J.A. 80.

4. In October 1995, acting on charges filed by the unions that petitioner had sued in federal court, the Board's General Counsel issued an administrative complaint against petitioner. Pet. App. 9a-10a, 29a. The complaint alleged that petitioner violated Section 8(a)(1) of the NLRA by filing and maintaining a meritless lawsuit against the unions for a retaliatory purpose. *Id.* at 29a-30a. The General Counsel and petitioner filed cross-motions for summary judgment. *Id.* at 29a.

Acting on the summary judgment motions, the Board sustained the General Counsel's complaint. Pet. App. 28a-68a. The Board first concluded that the union ac-

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[2] Petitioner mischaracterizes the Ninth Circuit's discussion of this issue. Contrary to petitioner's assertion (Br. 6), the Ninth Circuit did *not* "conclude[] that, but for the fact that the Unions had been successful on a slight majority of their claims, much of the Union activity alleged in BE&K's complaints would not have been protected from the antitrust laws." The Ninth Circuit's holding (J.A. 78-79) was that—when an antitrust plaintiff alleges that a course of litigation was sham activity for purposes of *Noerr*—the substantial success of those earlier-resolved actions suffices to disprove the antitrust plaintiff's sham-litigation argument.

tivities that were the subject of petitioner's federal lawsuit—legislative lobbying efforts, state-court litigation, and institution of grievance and arbitration proceedings—all concerned conditions of employment and were protected by Section 7 of the NLRA. *Id.* at 56a. The Board rejected petitioner's argument that the unions engaged in those activities with an unlawful secondary objective of driving non-union contractors out of the California construction market. *Id.* at 33a, 56a-57a. The Board explained that petitioner had made an identical argument in the federal district court when it unsuccessfully alleged violations of the Labor-Management Relations Act, and that petitioner had not appealed the district court's rejection of its argument. *Id.* at 56a-57a.

The Board then applied *Bill Johnson's* and held that both of this Court's requirements for finding that a completed lawsuit constituted an unfair labor practice had been satisfied: petitioner's federal lawsuit "lacked merit" and it was pursued "out of a desire to retaliate against the unions for engaging in protected concerted activity." Pet. App. 62a; see 461 U.S. at 747. The Board first rejected petitioner's contention that, in light of *Professional Real Estate Investors*, petitioner's unsuccessful lawsuit could not be found to lack merit "if there was a reasonable basis for pursuing it." Pet. App. 43a. The Board explained that the completed-lawsuit standard of *Bill Johnson's* "squarely applies" in this case and that *Professional Real Estate Investors* did not alter this standard. *Id.* at 43a-44a (citing *Diamond Walnut Growers, Inc.* v. *NLRB*, 53 F.3d 1085 (9th Cir. 1995)). Therefore, the fact that all of petitioner's claims were rejected by the district court on the merits, or were voluntarily withdrawn with prejudice, established that petitioner's federal suit was "unmeritorious within

the meaning of *Bill Johnson's*." *Id.* at 47a; see *id.* at 46a-49a.

The Board next turned to the requirement of a retaliatory motive. Pet. App. 59a-61a; see *Bill Johnson's*, 461 U.S. at 747. A retaliatory motive could be inferred in this case, the Board held, from the fact that petitioner's federal suit was "by its terms" directed at the same union lobbying, suit-filing, and grievance-filing that the Board had found was protected under Section 7. Pet. App. 59a. Because petitioner admitted that its suit "was aimed directly at protected activity," and because the suit "necessarily tended to discourage similar protected activity," the Board held that petitioner's suit was retaliatory for purposes of applying *Bill Johnson's*. *Id.* at 59a-60a. The Board also noted petitioner's attempt to have the district court impose liability for filing the *Pile Drivers* suit on unions that were not parties to the *Pile Drivers* litigation. That aspect of petitioner's suit, the Board held, indicated that petitioner "was interested only in harassing the Unions, not in obtaining justice." *Id.* at 60a. Finally, the Board concluded that petitioner's claims under Section 303 of the Labor-Management Relations Act suffered from an "utter absence of merit," which also supported a finding of retaliatory motive under *Bill Johnson's*. Pet. App. 60a-61a (citing 461 U.S. at 747).

To remedy petitioner's unfair labor practice, the Board entered an order directing petitioner to cease and desist from engaging in the conduct found unlawful, directed petitioner to post a notice to its employees, and ordered petitioner to reimburse the unions for expenses they had incurred in defending against the federal lawsuit that constituted the unfair labor practice. Pet. App. 65a-68a. The Board noted (*id.* at 63a) that *Bill Johnson's* explicitly authorized an award of attorneys'

fees and expenses against an employer in this context. See 461 U.S. at 747. The Board also rejected (Pet. App. 64a-65a) petitioner's contention that, notwithstanding the language of *Bill Johnson's*, the Board's authority to award attorneys' fees and litigation expenses is limited to cases in which the violator of Section 8(a)(1) engaged in "frivolous" litigation. The Board explained (*id.* at 64a-65a) that it was awarding attorneys' fees to remedy the unfair labor practice it had identified, and that the Board has authority to award make-whole relief for employers' unfair labor practices. See generally 29 U.S.C. 160(c).

5. The United States Court of Appeals for the Sixth Circuit denied a petition for review filed by petitioner and enforced the Board's order. Pet. App. 1a-25a. As is relevant here, the court of appeals agreed with the Board that *Bill Johnson's* provides the analytic framework for this case. The court rejected petitioner's argument that *Professional Real Estate Investors* required the Board to determine whether petitioner's completed suit was "baseless." *Id.* at 18a-19a. The court explained that *Professional Real Estate Investors* addressed the sham-litigation exception to *Noerr* antitrust immunity, not the circumstances under which the Board may find an unfair labor practice. *Ibid.* The court of appeals further observed that, although the *Professional Real Estate Investors* Court supported its antitrust holding with an analogy to *Bill Johnson's*, this analogy was to the standards stated in *Bill Johnson's* for enjoining ongoing litigation, not the standards for finding an unfair labor practice after a decision has been rendered in the court case that is the alleged unfair labor practice. *Id.* at 19a; see 508 U.S. at 59. The court of appeals thus found *Professional Real Estate Investors* "totally inapplicable" to this case. Pet. App. 19a.

Applying *Bill Johnson's*, the court of appeals upheld the Board's finding that petitioner's federal suit lacked merit. Like the Board, the court of appeals concluded that the suit's lack of merit was established by both the federal district court's dismissal orders (which the Ninth Circuit upheld) and petitioner's voluntary withdrawal of its other claims. See Pet. App. 17a-18a. The court of appeals also upheld the Board's finding that petitioner filed its suit with a retaliatory motive. *Id.* at 20a-22a. The court found (*ibid.*) that the demonstrated lack of merit to petitioner's federal suit; petitioner's repetitive filing of amended complaints that re-alleged claims on which the district court had already ruled; petitioner's pursuit of antitrust treble damages as a punitive sanction for the unions' protected Section 7 activities; and petitioner's attempts to obtain damages from unions that (as petitioner knew or should have known) were not parties to the *Pile Drivers* action, collectively supported the Board's finding of a retaliatory motive.

Finally, the court of appeals upheld the Board's award of attorneys' fees to the unions. Pet. App. 22a-25a. The court found that the award was an appropriate exercise of the Board's remedial authority because it helped to return the injured unions "to the financial positions they occupied prior to the filing of [petitioner's] unmerited, retaliatory suit." *Id.* at 24a.

SUMMARY OF ARGUMENT

1. By filing a lawsuit in retaliation for the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157, an employer or labor union may be able to impose substantial litigation costs on the employee-defendants and discourage other employees from undertaking similar protected activities. The NLRA broadly prohibits

practices that restrain, coerce, or interfere with the exercise of protected employee rights and, accordingly, the Board has determined in a number of contexts that such retaliatory lawsuits are unfair labor practices.

In *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), this Court rejected the Board's view that it could find an unfair labor practice based solely on the plaintiff's retaliatory motive in filing the suit. The Court held in light of First Amendment and federalism concerns that, in order to find that completed, retaliatory state-court litigation constitutes an unfair labor practice, the Board must find that the judgment went against the plaintiff, that the plaintiff withdrew the suit, or that the suit was otherwise shown to be without merit. That rule governed further proceedings in the case and was not dictum. Nor did *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), overrule *Bill Johnson's*. The question of how to apply the NLRA in the context of retaliatory litigation was not before the Court in *Professional Real Estate Investors*. Congress, moreover, has impliedly accepted the holding of *Bill Johnson's* by failing, over the course of nearly two decades, to supersede that holding through new legislation. For all those reasons, *stare decisis* principles weigh heavily against petitioner's call to overrule *Bill Johnson's*.

2. Petitioner errs in reading cases such as *Professional Real Estate Investors* and *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), as establishing a bright-line constitutional rule. In those cases, this Court interpreted particular statutes in light of their language, history, and purposes. To the extent that the Court considered the First Amendment, it never stated or suggested a rule that the government may not pro-

vide for make-whole relief against a party who files and prosecutes an ill-motivated lawsuit unless the lawsuit is objectively baseless. Indeed, the inflexible First Amendment rule that petitioner urges this Court to adopt would cast doubt on the validity of many long-accepted provisions of federal and state law, including Rule 11(b)(1) of the Federal Rules of Civil Procedure, the common-law tort of abuse of process, and the federal courts' exercise of their inherent authority to assess attorneys' fees against parties who prosecute lawsuits in bad faith. The logic of petitioner's position also would unwarrantedly constitutionalize the American Rule that a prevailing litigant ordinarily is not entitled to collect attorneys' fees from the loser. See generally *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975).

3. There is no inconsistency between the rule that the Board and the court of appeals applied in this case (that the Board may find that a losing, retaliatory lawsuit was an unfair labor practice and order the plaintiff to compensate the defendant for its costs of defending against the suit) and the further rule, also stated in *Bill Johnson's*, that the Board may not enjoin the prosecution of an ongoing, retaliatory state-court lawsuit as an unfair labor practice unless the lawsuit is baseless. In the first place, an award of attorneys' fees against a plaintiff after the judgment in the underlying litigation is a less severe remedy than enjoining prosecution of an ongoing lawsuit. It also is black-letter law that the possibility of subsequent civil or criminal proceedings generally is less problematic than an injunction against the exercise of First Amendment rights. *Bill Johnson's*, moreover, allows litigants who file non-frivolous suits to proceed to discovery, through which they may obtain sufficient evidence to win their case and thereby

insulate themselves from liability for committing an unfair labor practice—even though they may have filed their suit with a retaliatory motive.

It also is relevant that petitioner brought its suit against the unions in federal court, not state court. When holding in *Bill Johnson's* that the Board may not *enjoin* an ongoing, retaliatory lawsuit unless it is baseless, this Court relied heavily on federalism concerns and the States' interest in providing a judicial forum for the peaceful resolution of disputes. Those concerns have no place in this case. Thus, there is less in this case to counterbalance the public interest in protecting employees' Section 7 rights, and even less reason than in *Bill Johnson's* to require the Board to find, before enforcing the Act against a losing plaintiff who acted with a retaliatory motive, that the unsuccessful litigation was baseless.

4. The rules stated in *Professional Real Estate Investors* and *Bill Johnson's* reflect the statutory schemes that were at issue in these cases. In *Professional Real Estate Investors*, the possibility of an antitrust counterclaim was likely to weigh heavily on a potential plaintiff. The antitrust laws authorize private enforcement; private antitrust actions are particularly expensive and time-consuming to defend against; and the treble-damages remedy provides a strong disincentive to initiating litigation that could trigger an antitrust claim. By contrast, the NLRA generally is enforced only by the Board, not in suits between private parties. If the Board does issue a complaint, its procedural rules minimize the costs of defending against the enforcement action. And even if the Board finds an unfair labor practice, it lacks authority to impose exemplary damages such as the antitrust treble-damages remedy. For all those reasons, *Bill Johnson's* suffi-

ciently protects First Amendment petitioning rights in the NLRA context and there is no need to provide the same immunity for losing, non-frivolous lawsuits that *Professional Real Estate Investors* provides in the antitrust context.

The Board's requirement of a retaliatory motive further safeguards the First Amendment rights of potential plaintiffs in the NLRA context. The Board gives weight, when applying its motive requirement, to factors including whether the completed lawsuit, although unsuccessful, had a legal and factual basis. Under the Board's precedents, a potential plaintiff who litigates in good faith rather than to deter employees from exercising their protected rights has little reason to fear that he will be held liable for committing an unfair labor practice.

ARGUMENT

THE BOARD MAY FIND AN UNFAIR LABOR PRACTICE AND IMPOSE A MAKE-WHOLE REMEDY WHEN AN EMPLOYER PROSECUTES, WITH A RETALIATORY MOTIVE, A LOSING LAWSUIT AGAINST EMPLOYEES, EVEN IF THE SUIT WAS NOT "OBJECTIVELY BASELESS"

In *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), this Court limited the protections afforded to employees under the NLRA in order to accommodate an employer's First Amendment right to petition the government by filing a state-court suit. The Court succinctly stated the rule that resulted from its balance of statutory and constitutional commands: "[A]lthough it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reason-

able basis." *Id.* at 749. The Board has applied that rule for nearly two decades.

The rule of *Bill Johnson's* is consistent with the First Amendment and with this Court's discussion of antitrust immunity in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). The rule also has proved workable in practice and it is supported by *stare decisis*, as well as by principles of statutory construction and administrative law. The rule stated in *Bill Johnson's* should not be disturbed.

A. The Court's Decision in *Bill Johnson's* Is Entitled To Repose

1. As the Court recognized in *Bill Johnson's*, Section 8(a)(1) of the NLRA is a "broad, remedial provision" that Congress enacted to "guarantee that employees will be able to enjoy their rights protected by § 7—including the right to unionize [and] the right to engage in concerted activity for mutual aid and protection * * *—without fear of restraint, coercion, discrimination, or interference from their employer." 461 U.S. at 740. Discharging employees who join or assist unions is one method of discouraging workers from exercising their Section 7 rights, and a classic unfair labor practice. See, *e.g.*, *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47-48 (1937). So too, a lawsuit "may be used by an employer as a powerful instrument of coercion or retaliation." *Bill Johnson's*, 461 U.S. at 740. By filing a lawsuit against employees who engage in protected Section 7 activity, an employer can force the employee-defendants to retain counsel and to incur substantial legal expenses. *Id.* at 740-741. The suit is likely to put considerable pressure on the employee-

defendants to cease the challenged activity, even though it is protected by the NLRA. The suit also may discourage protected activity by other employees, who have been put on notice that they risk a similar suit. If an employer files a civil suit in response to an employee's filing of unfair labor practice charges with the Board, other employees may be discouraged from invoking the Board's process or cooperating with Board investigations. When the employer seeks monetary damages in addition to injunctive relief, as in this case, the suit's "chilling effect" on protected Section 7 activity is multiplied. *Id.* at 741.

The Board's decisions illustrate a number of recurring situations in which a lawsuit—whether filed by an employer or a labor union—may have the purpose and effect of deterring the exercise of rights protected by the NLRA. An employer or union may file a lawsuit to retaliate against employees for filing charges with the Board or for engaging in other activity protected by the NLRA.[3] Unions may sue employees to enforce unlaw-

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[3] See, *e.g.*, *Bill Johnson's*, 461 U.S. at 733-734; *Sheet Metal Workers' Union, Local 355*, 254 N.L.R.B. 773, 778-780 (1981) (union state-court suit seeking $30,000 in damages from employee who filed charges with Board), enforcement granted in part and denied in part, 716 F.2d 1249 (9th Cir. 1983); *United Credit Bur. of Am., Inc.*, 242 N.L.R.B. 921, 925-926 (1979) (employer state-court fraud suit seeking $10,000 in damages from employee who filed charges with Board), enforced, 643 F.2d 1017 (4th Cir.), cert. denied, 454 U.S. 994 (1981); *George A. Angle*, 242 N.L.R.B. 744, 746-748 (1978) (similar employer suit), enforced, 683 F.2d 1296 (10th Cir. 1982); *Power Sys., Inc.*, 239 N.L.R.B. 445, 446-450 (1978) (similar employer suit), enforcement denied on other grounds, 601 F.2d 936 (7th Cir. 1979); *W.T. Carter & Brother*, 90 N.L.R.B. 2020, 2024 (1950) (employer state-court suit to enjoin the holding of union meetings during organizing campaign), overruled by *Clyde Taylor Corp.*, 127 N.L.R.B. 103 (1960).

ful fines or unlawful union-security agreements.[4] Or a union may sue an employer in pursuit of unlawful objectives.[5]

After grappling with such abusive suits for several decades, see *Bill Johnson's*, 461 U.S. at 737-739 (discussing Board decisions), the Board ultimately concluded that, whether the lawsuit was filed by an employer or a labor organization, "the *only* essential element of a violation is retaliatory motive," that is, a motive to interfere with the exercise of protected rights. *Id.* at 740; see *Power Sys., Inc.*, 239 N.L.R.B. 445, 449-450 (1978), enforcement denied on other grounds, 601 F.2d 936 (7th Cir. 1979). To remedy such a violation of the Act, the Board concluded that the party filing the retaliatory suit should be required to cease and desist from prosecuting it, and to make the sued party whole for legal expenses incurred in defending against the suit. See *Id.*. at 450.

2. In *Bill Johnson's*, this Court rejected the Board's rule that allowed a finding of an unfair labor practice based solely on the plaintiff's retaliatory motive in

[4] See, *e.g.*, *Granite State Joint Bd., Textile Workers Union, Local 1029*, 187 N.L.R.B. 636, 636 (1970) (state-court suit to collect fines from employees who resigned membership and crossed picket line), enforcement denied, 446 F.2d 369 (1st Cir. 1971), rev'd, 409 U.S. 213 (1972); *Booster Lodge No. 405, IAM*, 185 N.L.R.B. 380, 380-382 (1970) (similar union suit), aff'd in part, 459 F.2d 1143 (D.C. Cir. 1972), rev'd *sub nom. NLRB* v. *Boeing Co.*, 412 U.S. 67 (1973); *United Stanford Employees, Local 680*, 232 N.L.R.B. 326, 331 (1977) (state-court suit to enforce overbroad union-security clause), enforced, 601 F.2d 980 (9th Cir. 1979); *Television Wis., Inc.*, 224 N.L.R.B. 722, 722 n.2, 779-780 (1976) (similar union suit).

[5] See *International Org. of Masters, Mates, & Pilots*, 224 N.L.R.B. 1626, 1626 n.2, 1634-1636 (1976) (*in rem* suit and picketing to compel vessel owner to accept union contract and employ union members), enforced, 575 F.2d 896 (D.C. Cir. 1978).

filing a state-court suit, without regard to the merit or outcome of the suit. The court found the Board's approach "untenable" because it was insufficiently sensitive to the plaintiff's First Amendment right to petition the courts for redress, and insufficiently respectful of the States' interest in providing a forum for adjudication of their citizens' claims. 461 U.S. at 743; see pp. 2-3, *supra*.[6]

Those First Amendment and federalism concerns, the Court held, warranted modification of the Board's liability rule and adoption of an interrelated set of rules for applying Section 8(a). *First*, the Court held, "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law." 461 U.S. at 748; see also *id.* at 744. Thus, "[r]etaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit." *Id.* at 748-749. *Second*, if the Board must allow the suit to proceed in the state court and "the employer's case * * * ultimately proves meritorious and he has judgment against the employees," the employer "should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice." *Id.* at 747. But, because the First Amendment and federalism concerns that required limiting the Board's authority to halt an ongoing state-court suit do not apply as strongly when the suit is completed and has resulted in a loss to the plaintiff, the employer need not prevail before the

[6] This Court has construed the NLRA in light of constitutional considerations in other cases as well. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

Board "[i]f judgment goes against the employer in the state court * * * or if his suit is withdrawn or is otherwise shown to be without merit." *Ibid.* In that situation, "the employer has had its day in court, [and] the interest of the State in providing a forum for its citizens has been vindicated." *Ibid.* "If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief," including reimbursing the employees wrongfully sued for their attorneys' fees and other expenses. *Id.* at 747, 749.[7]

3. Petitioner argues that, insofar as *Bill Johnson's* addressed completed lawsuits, its rule is "dicta" that has been superseded by *Professional Real Estate Investors*. See, *e.g.*, Pet. Br. 16-17, 21, 25-26. Petitioner is mistaken. This Court specifically noted that some claims in the state-court suit at issue in *Bill Johnson's* had been dismissed, and the Court remanded so that the Board could apply the Court's standard for completed litigation to those claims. 461 U.S. at 750 n.15.

[7] Petitioner contends (Br. 20) that the *Bill Johnson's* Court used the terms "unmeritorious" and "without merit" to mean "baseless," rather than "losing." If "unmeritorious" and "baseless" were interchangeable, however, it would have made no sense for the Court to state that, "although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis." 461 U.S. at 749. *Bill Johnson's* is clear, moreover, that the Board may find that a completed lawsuit is unmeritorious if: (1) "judgment goes against the employer"; (2) his suit is withdrawn; or (3) the suit "is otherwise shown to be without merit." *Id.* at 747. Where there is a judgment adverse to the plaintiff, therefore, no further inquiry into the merit of the suit is needed in order to find the suit unmeritorious for purposes of *Bill Johnson's*.

As the Court explained, "[i]f petitioner's other claims have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that petitioner acted unlawfully by prosecuting these unmeritorious claims if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose." *Ibid.*

Nor did *Professional Real Estate Investors* purport to "overrule[] or supercede[]" (Pet. Br. 25) any part of *Bill Johnson's*. As the court of appeals correctly explained in this case (Pet. App. 18a-19a), the narrow issue before the Court in *Professional Real Estate Investors* was how to "define the 'sham' exception to the doctrine of antitrust immunity first identified in *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)." 508 U.S. at 51. The petition for a writ of certiorari in *Professional Real Estate Investors* specifically noted that *Bill Johnson's* was "an interpretation of the labor laws" that "cannot be imported wholesale into an antitrust setting." 91-1043 Pet. at 14. Respondents, although citing *Bill Johnson's* as support for their arguments, agreed that "the precise question in *Bill Johnson's* involved the meaning of the National Labor Relations Act," not *Noerr* antitrust immunity. No. 91-1043 Resp. Br. at 24. The proper application of the NLRA in light of First Amendment concerns therefore was not at issue in *Professional Real Estate Investors*, and the Court did not address this question. Thus, *Professional Real Estate Investors* could not have overruled *Bill Johnson's*. See *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (case in which issue is not "raised in briefs or argument nor discussed in the opinion of the Court" is not "binding precedent on th[e]

point"); *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (same).

Far from intimating any disapproval of *Bill Johnson's*, moreover, the *Professional Real Estate Investors* Court pointed to the rule stated in *Bill Johnson's* for enjoining ongoing litigation as a useful "analogy to *Noerr's* sham exception." 508 U.S. at 59. Petitioner suggests (Br. 17) that this reference casts doubt on the completed-litigation rule of *Bill Johnson's*. In fact, however, the Court's limited use of *Bill Johnson's* as an "analogy" confirms that *Professional Real Estate Investors* did not address the correct construction of the NLRA.

Petitioner's reading of *Professional Real Estate Investors* also is inconsistent with principles of deference to administrative decision-making. As explained above, the *Bill Johnson's* Court disagreed with the Board's conclusion that a lawsuit filed with a retaliatory motive could be addressed as an unfair labor practice, regardless of the success or failure of the suit. See 461 U.S. at 739-740. The Court recognized, however, that the Board's interpretation was entitled to judicial deference. *Id.* at 742; see *NLRB* v. *Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (deferring to Board construction of NLRA that is "reasonable and consistent with the Act"). The Court therefore departed from the Board's rule only to the extent that First Amendment and federalism concerns made the Board's position "untenable" and compelled a rule more protective of state-court litigation. 461 U.S. at 742-743.

Petitioner, however, suggests that *Professional Real Estate Investors* further limited the Board's ability to enforce the NLRA, without ever saying so or explaining why. If the Court had done that—which it did not—then *Professional Real Estate Investors* would

have violated the Court's consistent teaching that "[t]he function of striking [a] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the * * * Board, subject to limited judicial review."[8] *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 501 (1978) (internal quotation marks omitted). Petitioner's unprincipled reading of *Professional Real Estate Investors* should be rejected.

4. The completed-litigation rule of *Bill Johnson's* therefore was material to the holding of the case and has not been overruled. It accordingly deserves respect under traditional principles of *stare decisis*. Indeed, *stare decisis* principles have "special force" (*Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989)) in this case because—although the *Bill Johnson's* Court deemed constitutional concerns relevant to construing the NLRA—the case fundamentally involved "interpretation of the Act" (461 U.S. at 743). When the interpretation of a congressional enactment is at issue, Congress can correct, through further legislation, any perceived error in the Court's decisions. *Patterson*, 491 U.S. at 172-173; *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). But if Congress has not acted to alter this Court's understanding of a statute, changes in the Court's interpretation threaten to usurp congressional authority and to discourage Congress from fulfilling its assigned constitutional role.

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[8] The constitutional overtones of *Professional Real Estate Investors* would not have justified a departure from traditional principles of administrative law in that decision. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 190-191 (1991) (upholding agency interpretative regulation as reasonable and entitled to deference despite constitutional concerns that had "some force").

See *Neal* v. *United States*, 516 U.S. 284, 296 (1996) ("Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.").

In this case, Congress has had nearly 19 years to consider the rules for applying Section 8(a) that were stated in *Bill Johnson's* and, if it disagreed with these rules, to make a legislative response. Congress has not taken any such legislative action. The Court therefore should accord "weight to [Congress's] continued acceptance of" *Bill Johnson's*. *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

Nor does petitioner suggest a "special reason," unrelated to the correctness of *Bill Johnson's*, to reopen the Court's construction of the NLRA. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 864 (1992). This emphatically is not a case where the Court's holding "has proven to be intolerable simply in defying practical workability" or has been eclipsed by changes of law or fact. *Id.* at 854-855. Both the Board in exercising its accumulated experience about the workplace (and specifically about the dangers retaliatory lawsuits pose to the exercise of rights protected by the Act),[9] and the courts of appeals in reviewing the Board's decisions,[10]

[9] See, *e.g.*, *Braun Elec. Co.*, 324 N.L.R.B. 1, 2 (1997); *Summitville Tiles, Inc.*, 300 N.L.R.B. 64, 65 & n.6 (1990); *IAM, Dist. Lodge No. 91 (United Technologies Corp.)*, 298 N.L.R.B. 325, 326 (1990), enforced, 934 F.2d 1288 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992); *Dahl Fish Co.*, 279 N.L.R.B. 1084, 1111 (1986), enforced, 813 F.2d 1254 (D.C. Cir. 1987).

[10] See Pet. App. 16a-19a; *Petrochem Insulation, Inc.* v. *NLRB*, 240 F.3d 26, 32 (D.C. Cir.), cert. denied, 122 S. Ct. 458 (2001); *Diamond Walnut Growers, Inc.* v. *NLRB*, 53 F.3d 1085, 1088 (9th Cir. 1995); *NLRB* v. *International Union of Operating Eng'rs, Local 520*, 15 F.3d 677, 679 (7th Cir. 1994); *Dash* v. *NLRB*, 793 F.2d 1062, 1070 (9th Cir. 1986). Petitioner suggests (Br. 21-22) that the Second Circuit has "declined to accept" the Board's application of *Bill Johnson's*. In *NLRB* v. *Vanguard Tours, Inc.*, 981 F.2d 62 (1992), the Second Circuit held that, for purposes of applying *Bill Johnson's*, a plaintiff's voluntary withdrawal of a state-court lawsuit does not "signif[y] a determination by the state court that the suit was 'without merit.'" *Id.* at 66. As the court of appeals below explained (Pet. App. 18a n.3), *Vanguard Tours* does not address the situation presented here, where "the majority of a plaintiff's cause of action is dismissed on the merits and only a portion is voluntarily withdrawn." Nor did the *Vanguard Tours* court address voluntarily dismissal of claims *with prejudice*, which has the same effect as a dismissal on the merits. See *id.* at 49a & n.37. The *Vanguard Tours* court, moreover, agreed that where, as here, "the plaintiff has lost on the merits[,] * * * the Board may consider the filing of the suit to have been an unfair labor practice" upon a showing of retaliatory motive. 981 F.2d at 65.

have read *Bill Johnson's* as establishing a separate rule for finding an unfair labor practice based on completed litigation (as distinguished from halting ongoing litigation), and they have had no trouble applying this distinction. Cf. *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593, 605-606 (2001) (relying on absence of any "indication from either Congress or agencies with expertise" that Court's prior decision created unworkable statutory scheme). The most that petitioner can argue (Pet. 22-24) is that some courts of appeals have urged "clarif[ication]" of *Bill Johnson's* in light of *Professional Real Estate Investors*, but that is no more an argument for overturning *Bill Johnson's* than for reaffirming it.

B. *Professional Real Estate Investors* Did Not Establish A "Uniform" Constitutional Rule

Petitioner's central argument for overruling the completed-litigation prong of *Bill Johnson's* is that

Professional Real Estate Investors and other decisions of this Court have stated a "uniform" constitutional rule for when the filing and prosecution of a lawsuit may give rise to statutory liability, which "applie[s] in every imaginable context." Pet. Br. 18, 25. Petitioner badly misreads this Court's cases.

1. *Professional Real Estate Investors* stated a rule of antitrust, not a rule of constitutional law. The Court refined the doctrine of *Noerr*, which is a "doctrine of *antitrust* immunity" (508 U.S. at 51 (emphasis added)) implementing the Sherman Act (see *id.* at 56 (discussing *Noerr*)). As the Court has elsewhere explained, *Noerr* "[i]nterpret[ed] the Sherman Act in the light of the First Amendment's Petition Clause." *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990). Likewise, although the definition of "sham" litigation set out in *Professional Real Estate Investors* reflected First Amendment concerns, the definition applies specifically to antitrust claims. See 508 U.S. at 60-61.

The *Professional Real Estate* Court noted (and petitioner reiterates, Br. 18) that *Noerr* has been "invok[ed] * * * in other contexts" besides antitrust. 508 U.S. at 59. But the Court also explained that the consistent principle running through those invocations of *Noerr* is "that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." *Ibid.* (citing *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 424, and *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913-914 (1982)). That narrow principle does not suggest a limitation on the Board's authority to award make-whole relief under the NLRA after determining that a losing lawsuit was brought to interfere with or restrain the exercise of rights protected by Section 7.

2. In its effort to show that *Professional Real Estate Investors* states an inflexible First Amendment rule, petitioner additionally relies (Br. 19-20) on *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). *Christiansburg*, however, proves the point that the Court's cases in this area turn on interpretation of particular statutes. The question in *Christiansburg* was when a prevailing civil-rights defendant is eligible for an award of attorneys' fees under Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), which provides that "the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee." See 434 U.S. at 413-414. After finding the language of Title VII unhelpful, see *id.* at 418, the Court focused on "equitable considerations" (*ibid.*) and legislative history suggesting that Congress "wanted to protect defendants from burdensome litigation having no legal or factual basis" (*id.* at 420). In light of those considerations, the Court held that a losing plaintiff "should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless." *Id.* at 422. The Court added, however, that if a losing plaintiff brought his claim in bad faith, then "there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." *Ibid.*; see also *id.* at 417 & n.9, 419 & n.13.

The holding of *Christiansburg* turned on "the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 762 (1980). Absolutely nothing in *Christiansburg* suggests that the Court perceived a First Amendment prohibition against shifting attorneys' fees to losing plaintiffs

—particularly where (as in the NLRA context) the losing plaintiff filed his suit with a wrongful motive. Indeed, the *Christiansburg* decision does not mention the First Amendment or the constitutional right to petition the courts for redress of grievances.

Nor can it be argued that *Professional Real Estate Investors* gave *Christiansburg* constitutional status. A year after it decided *Professional Real Estate Investors*, the Court once again evaluated the availability of attorneys' fees to a prevailing defendant as a matter of statutory construction (this time in the copyright context). See *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994). In light of the different statutory context in *Fogerty*, the Court declined to follow *Christiansburg*. *Id.* at 522-525. The Court instead identified some "non-exclusive factors" that courts could consider when deciding whether to award attorneys' fees, including not only "frivolousness" and "objective unreasonableness," but also "motivation" and "the need in particular circumstances to advance considerations of compensation and deterrence." *Id.* at 534 n.19. *Fogerty* thus confirms that there is no constitutional prohibition on assessing attorneys' fees against a losing plaintiff whose lawsuit was not objectively baseless.

3. Petitioner wholly ignores the breath-taking implications of its argument that the "objectively baseless" standard of *Professional Real Estate Investors* is a constitutional rule that applies whenever government would impose liability on a private party for filing and prosecuting a lawsuit. If accepted, petitioner's theory would appear to invalidate numerous federal and state statutory provisions and rules that expressly authorize the imposition of fees on a losing plaintiff without a finding that the plaintiff's suit lacked a reasonable basis.

A provision of federal labor law that is not at issue in this case provides one example. Under Section 7 of the Norris-LaGuardia Act, 29 U.S.C. 107, federal courts lack jurisdiction to issue an injunction "in any case involving or growing out of a labor dispute," unless the court makes findings specified in the statute. That provision further states that "[n]o temporary restraining order or temporary injunction shall be issued" unless the party seeking injunctive relief files "an undertaking with adequate security * * * to recompense those enjoined for any loss * * * caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorneys' fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court." 29 U.S.C. 107. Fees therefore may sometimes be shifted under the Norris-LaGuardia Act to a plaintiff who requests injunctive relief, even if the request was not frivolous. See, *e.g.*, *UAW* v. *LaSalle Mach. Tool, Inc.*, 696 F.2d 452, 459 (6th Cir. 1982); *Elgin, Joliet & Eastern Ry.* v. *Brotherhood of R.R. Trainmen*, 302 F.2d 540, 545 (7th Cir.), cert. denied, 371 U.S. 823 (1962); *Umeko, Inc.* v. *New York Coat, Suit, Dress, Rainwear & Allied Workers Union*, 484 F. Supp. 210, 211 (S.D.N.Y. 1980).

Rule 11 of the Federal Rules of Civil Procedure provides in part that "[b]y presenting to the [federal] court * * * a pleading, written motion, or other paper," the proponent of the document is certifying that, *inter alia*, the document "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b) and (b)(1). A party who violates Rule 11(b)(1) may be ordered by the court

to pay the opposing party "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2). Filing a frivolous claim is separately prohibited by Rule 11(b)(2). Thus, under the plain terms of Rule 11, a complaint filed with "any improper purpose" is sufficient grounds for an attorneys'-fees sanction, whether or not the complaint had a reasonable basis.[11] Indeed, the 1993 advisory committee note to Rule 11(b) and (c) explains that an award of attorneys' fees to the opposing party may be warranted "particularly for (b)(1) violations." See *Clinton* v. *Jones*, 520 U.S. 681, 709 n.42 (1997) (noting that sanctions under Rule 11 may be appropriate "where a claim is 'presented for any improper purpose, such as to harass'"). Like Rule 11, various state laws authorize the imposition of attorneys' fees or other sanctions on a litigant who initiates a lawsuit with an improper purpose, without requiring that the lawsuit also be baseless. See Carol R. Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 Ohio St. L.J. 665, 719-723 (2000) (identifying state statutes).

Petitioner's theory likewise would endanger the common-law tort of abuse of process, which the Restatement defines as the "use[] [of] a legal process,

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[11] Cf. *Lancelotti* v. *Fay*, 909 F.2d 15, 18-19 (1st Cir. 1990) (per Breyer, J.) (1983 version of Rule 11 "ha[d] rather consistently been read by federal appellate courts to reach [pleadings] which, while not devoid of all merit, were filed for some malign purpose"); *Brown* v. *Federation of State Med. Bds.*, 830 F.2d 1429, 1436 (7th Cir. 1987) ("improper purpose" prong of Rule 11 encompasses filing of colorable suit for purpose of imposing expense on defendant); but see *Townsend* v. *Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc) (non-frivolous complaints not subject to Rule 11 sanctions).

whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." Restatement (Second) of Torts § 682, at 474 (1977). A leading treatise states that the tort of abuse of process "differs from malicious prosecution in that it is not necessary to show that the action in which the process was used was without probable cause or that it terminated favorably to the [tort] plaintiff." Fowler V. Harper, Fleming James Jr. & Oscar S. Gray, *The Law of Torts* § 4.9, at 4:85 (3d ed. 1996) (footnotes omitted); see *Poduska* v. *Ward*, 895 F.2d 854, 855-857 (1st Cir. 1990) (affirming judgment for claimant in abuse-of-process case, where claimant lost in the underlying, abusive litigation). Providing a remedy for that traditional tort therefore would seem to be unconstitutional under petitioner's view of this Court's cases. Cf. *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F.2d 466, 470 (7th Cir. 1982) (per Posner, J.) ("If all nonmalicious litigation were immunized from government regulation by the First Amendment, the tort of abuse of process would be unconstitutional—something that, so far as we know, no one believes."), cert. denied, 461 U.S. 958 (1983).

Petitioner, moreover, suggests implicitly that federal courts may violate the First Amendment if they exercise what this Court has described as their "inherent power" to "assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44, 45-46 (1991) (quoting *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 258-259 (1975)). In *Chambers*, this Court indicated that a finding of "bad faith" would be sufficient to exercise that "inherent power" and it did not suggest that the federal court would have to find, in addition, that the litigant acted

without an objective basis. 501 U.S. at 50; see *id.* at 58, 59 (Scalia, J., dissenting) (noting that finding of bad faith is sufficient, but not necessary, to impose sanctions); *id.* at 60, 74 (Kennedy, J., dissenting) (courts may shift fees as a sanction "to the extent necessary to protect the judicial process"); see also *Black's Law Dictionary* 134 (7th ed. 1999) (defining "bad faith" as "[d]ishonesty of belief or purpose").

Taken to its logical extreme, petitioner's position also would give the American Rule—that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser," *Alyeska Pipeline*, 421 U.S. at 247—constitutional status, at least as applied to a losing plaintiff. That would be a radical departure from historical and legal tradition, for the American Rule has not always been followed in this country, see *id.* at 247-257, and this Court has said emphatically that "the circumstances under which attorneys' fees are to be awarded" is a "matter[] for Congress to determine," *id.* at 262. See *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 835 (1990) ("[T]he allocation of the costs accruing from litigation is a matter for the legislature, not the courts."). This Court should decline petitioner's invitation to construe *Professional Real Estate Investors* as establishing, *sub silentio*, a new First Amendment rule with such far-reaching consequences. See *Premier Elec. Constr. Co.* v. *National Elec. Contractors Ass'n*, 814 F.2d 358, 373 (7th Cir. 1987) (per Easterbrook, J.) ("Fee shifting * * * is no more a violation of the first amendment than is a requirement that a person who wants to publish a newspaper pay for the ink, the paper, and the press.").

C. The *Bill Johnson's* Court Reasonably Distinguished The Board's Authority To Remedy A Retaliatory Suit After Judgment From The Board's Authority To Enjoin Prosecution Of A Retaliatory Suit

Insofar as petitioner addresses *Bill Johnson's* on its own terms, petitioner argues primarily (Br. 13, 27) that having a different rule for imposing attorneys' fees on a plaintiff who brought a losing lawsuit, as opposed to enjoining the prosecution of ongoing litigation, cannot be consistent with the First Amendment because there is no meaningful First Amendment distinction between the two situations. Petitioner's logic fails on several counts.

1. This Court's cases foreclose petitioner's contention that barring a plaintiff from prosecuting a lawsuit is no different from assessing attorneys' fees on a losing plaintiff. Awarding attorneys' fees, the Court has held in the context of judicial sanctions, is "less severe" than the "particularly severe sanction" of terminating the suit. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45 (1991) (quoting *Roadway Express*, 447 U.S. at 765). That is equally true in the context of petitioner's First Amendment claim.

In *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984), the Court stressed that, while the First Amendment empowers individuals to "petition openly" and protects them "from retaliation for doing so," the Petition Clause "does not impose any affirmative obligation on the government to listen [or] to respond." *Id.* at 286 (internal quotation marks omitted). Likewise, in the prison context, the "right of access to the courts" recognized by this Court is "a right to bring to court a grievance that the inmate wishe[s] to present." *Lewis* v. *Casey*, 518 U.S. 343, 354

(1996). It follows that when a lawsuit is allowed to proceed to judgment, the plaintiff's protected First Amendment interest—his interest in expressing grievances—is fully vindicated. See Carol R. Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557, 646-647 (1999) (hereinafter *Right of Access*) (Petition Clause protects only the initial filing of a complaint). The employer or union "has had its day in court." *Bill Johnson's*, 461 U.S. at 747. The full prosecution of an action also serves the public interest in being informed of societal problems and in peaceful resolution of disputes, and allows the law to develop, whereas these interests might not be served when the prosecution of a suit is enjoined.

Bedrock First Amendment theory contradicts petitioner's suggestion that imposing liability after the completion of a losing lawsuit should be deemed to have the same "chilling" effect on potential litigants as enjoining prosecution of their suits. The right to petition "is cut from the same cloth as the other guarantees of [the First] Amendment." *McDonald* v. *Smith*, 472 U.S. 479, 482, 485 (1985). Under the Speech Clause and the Press Clause, the Court has recognized a "time-honored distinction * * * between prior restraints and subsequent punishments." *Alexander* v. *United States*, 509 U.S. 544, 553-554 (1993); see *id.* at 560, 566 (Kennedy, J., dissenting). "Behind the distinction," the Court has explained, "is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975). A prior restraint therefore "bear[s] a heavy presumption against its constitutional validity," *Bantam Books, Inc.* v.

Sullivan, 372 U.S. 58, 70 (1963), and "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for * * * misdeeds in the First Amendment context." *CBS, Inc.* v. *Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers). Petitioner's theory—that the First Amendment harm of enjoining the prosecution of a lawsuit before judgment is no greater than the First Amendment harm of imposing liability after the plaintiff's speech is complete and the case has been resolved in favor of the defendant—is irreconcilable with those "deeply etched" principles. Cf. *Alexander*, 509 U.S. at 555-558 (application of RICO forfeiture provisions after conviction for obscenity offenses does not impermissibly "chill" exercise of First Amendment right to deal in protected expressive material).[12]

The two-part rule of *Bill Johnson's* also respects the importance of discovery in civil litigation. The simplified notice-pleading authorized by the Federal Rules of Civil Procedure "is made possible by the liberal opportunity for discovery * * * to disclose more precisely the basis of" the plaintiff's claims. *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957). Because the Federal Rules do not require a claimant to set out in detail the facts upon which he bases his claim, summary dismissal of a civil case "for failure to set out evidential facts can seldom be justified." *United States* v. *Employing Plasterers*

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[12] We do not suggest that an injunction against a frivolous and retaliatory lawsuit that violates the NLRA, issued consistent with *Bill Johnson's*, would be a "prior restraint" in the sense condemned by this Court's cases. See *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 764 n.2 (1994); *Lawson* v. *Murray*, 515 U.S. 1110, 1113, 1115 (1995) (Scalia, J., concurring in denial of certiorari). The point, rather, is that petitioner ignores the principles underlying the prior restraint doctrine.

Ass'n, 347 U.S. 186, 189 (1954). Consistent with those principles, *Bill Johnson's* allows a plaintiff who states a non-frivolous cause of action to go forward to discovery, even if the plaintiff does not yet have the proof needed to win the case. If the plaintiff's discovery uncovers evidence that makes out the allegations of the complaint, he need not fear a post-judgment finding of an unfair labor practice. The *Bill Johnson's* rule for completed litigation does, however, discourage the filing of a retaliatory suit that, although not frivolous on its face, is filed without any expectation of locating evidentiary support.

2. Petitioner's argument that the *Bill Johnson's* standard for enjoining litigation should apply as well to finding an unfair labor practice based on a completed, losing lawsuit is especially unfounded in this case, because petitioner's unfair labor practice was the filing of a *federal* lawsuit. When considering the Board's power to enjoin the employer's state-court lawsuit in *Bill Johnson's*, this Court gave great weight to the States' "compelling interest" in maintaining "domestic peace" (461 U.S. at 741) by providing a judicial forum for their citizens. The *Bill Johnson's* Court "was concerned about whether the Board's interpretation of the NLRA would work to pre-empt the *State* from providing civil remedies for conduct touching interests 'deeply rooted in local feeling and responsibility.' 461 U.S., at 741." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984) (internal quotation marks omitted). The *Bill Johnson's* Court therefore explained that, when a judgment has been entered, "the interest of the State in providing a forum for its citizens has been vindicated" and an unfair labor practice can be found even if the lawsuit was not frivolous. 461 U.S. at 747.

In this case, petitioner filed its suit in federal court. Petitioner cannot (and does not) rely on the federalism concerns that largely underlay the ongoing-litigation standard of *Bill Johnson's*. See *Sure-Tan*, 467 U.S. at 898 ("Here, where there is no conflict between the Board's unfair labor practice finding and any asserted state interest, such federalism concerns are simply not at stake."). Therefore, although the Board adheres to the rules set out in *Bill Johnson's* when the lawsuit that is the basis for an allegation of an unfair labor practice was filed in federal court, see Pet. App. 44a n.28, 45a, petitioner is in an especially weak position to claim that the "baseless" standard *Bill Johnson's* established for enjoining state-court litigation should apply to its completed federal lawsuit. If any departure from the two-part rule of *Bill Johnson's* were warranted in a case arising out of federal-court litigation, the reasoning of *Bill Johnson's* would suggest that, because federalism concerns are not present, it might not be necessary for the Board to find that ongoing, retaliatory litigation is "baseless" before enjoining it in that context.

D. The Holdings of *Bill Johnson's* And *Professional Real Estate Investors* Reflect The Different Statutory Schemes At Issue In Those Cases

Just as there is no internal inconsistency in *Bill Johnson's*, the rules stated in that case are consistent with the Court's construction of the antitrust laws in *Professional Real Estate Investors*. Although a losing, retaliatory lawsuit may be remedied as an unfair labor practice under the NLRA without the showing of objective baselessness that would be required in the

antitrust context, this difference is readily explained by differences between the two statutory regimes.[13]

1. Congress has established very different rules for enforcing the antitrust laws and the NLRA. Congress authorized private enforcement of the Sherman Act via suits for damages under Section 4 of the Clayton Act, 15 U.S.C. 15, and for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. 26. A party who is considering whether to file a lawsuit that might be deemed anticompetitive can expect that, if he does file the suit, the defendant may counter-attack by challenging the suit as an antitrust violation. That threat of antitrust litigation may be daunting.

Pretrial discovery can be burdensome in antitrust litigation. See *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978) (antitrust cases "often encompass a great deal of expensive and time consuming discovery"), cert. denied, 440 U.S. 982 (1979). If an antitrust counter-claim is filed, the plaintiff who initiated the action may become enmeshed "in expensive and burdensome antitrust litigation, which would drag on through the discovery stage at least." *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982). Although this may deter lawsuits filed for anticompetitive purposes, it may deter other lawsuits as well; a potential plaintiff might "feel pressured

[13] Petitioner argues at length (Br. 29-35) that its federal-court lawsuit in this case was not "objectively baseless." This Court did not grant certiorari on that issue, however. See 122 S. Ct. 803 (Jan. 4, 2002). If the Court concludes that the Board applied the wrong legal test when determining whether petitioner's lawsuit was an unfair labor practice, the Court should remand to the Board for further proceedings under the correct legal standard. See, *e.g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 295 (1974).

to forego the exercise of its first amendment right to petition the courts." *Ibid.*

Successful antitrust plaintiffs, moreover, can recover treble damages as well as attorneys' fees from the antitrust violator. See 15 U.S.C. 15(a). The magnitude of antitrust liability creates an additional deterrent to filing a lawsuit (well-founded or not) that may lead to antitrust counter-claims. See *Hydro-Tech*, 673 F.2d at 1177 n.8 ("When the discovery burdens of antitrust cases are combined with the threat of treble damages, the prospect of an antitrust action can become a most potent weapon to deter" a would-be plaintiff from filing suit); *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Exec. Bd.*, 542 F.2d 1076, 1082 (9th Cir. 1976) ("Particularly in antitrust litigation, the long drawn out process of discovery can be both harassing and expensive. When this well known fact is combined with the large damages usually claimed * * * and sometimes awarded, an action like this one can be, from the very beginning, a most potent weapon to deter the exercise of First Amendment rights."), cert. denied, 430 U.S. 940 (1977).

Absent relatively generous immunity against an antitrust counter-claim—such as the "objectively baseless" test of *Professional Real Estate Investors*—the potential plaintiff may decide against bringing a well-founded suit (as well as an anticompetitive one) simply because the filing might trigger related antitrust litigation. Construing the antitrust laws as providing a generous safe harbor such as the "objectively baseless" test thus balances the risk of anticompetive lawsuits against the chilling effect that the treble-damages remedy and other distinct features of antitrust litigation may have on First Amendment petitioning activity. Cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421

U.S. 723, 742-743 (1975) ("threat of extensive discovery and disruption of normal business activities" weigh in favor of rule that only actual purchasers or sellers of securities may sue for damages under Section 10(b) of Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5).

Bill Johnson's struck a different balance, which reflects differences between the NLRA and the antitrust laws. Unlike the antitrust laws, the NLRA generally cannot be enforced in suits between private parties.[14] Parties file their unfair labor practice charges with the Board, and the Board's General Counsel has ultimate authority for authorizing the issuance of an administrative complaint upon such a charge. See 29 U.S.C. 153(d); *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 118-119 (1987). A party who is considering filing a lawsuit that he believes to be lawful under the NLRA therefore knows that the defendant cannot unilaterally counter-attack by claiming, without good cause, that the suit is an unfair labor practice. Rather, the Board's General Counsel will dismiss a charge filed by the defendant in the underlying lawsuit if, after an investigation, the General Counsel determines that there has been no violation of the Act or that the evidence is insufficient to substantiate the charge. 29 C.F.R. 101.5, 101.6; see, *e.g.*, *Paragon Gen. Contractors & Cabinetmakers, Inc.*, No. 32-CA-18569-1, 2001 WL 1155402 (NLRB G.C. June 22, 2001); *Wal-Mart Stores, Inc.*, No. 4-CA-28666, 2001 WL 1155418 (NLRB G.C. Apr. 23, 2001); *Wheat Mont. Bakery*, No. 19-CA-26575, 1999 WL 1319219 (NLRB

[14] The limited exception is that a private party may bring a damages action against a labor organization that violates Section 8(b)(4) of the Act, 29 U.S.C. 158(b)(4). See 29 U.S.C. 187.

G.C. Oct. 19, 1999); *Omni Elec., Inc.*, No. 8-CA-23905, 1991 WL 322617 (NLRB G.C. Dec. 16, 1991); see also James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 105 (1985) (arguing that, because only the Board can find an unsuccessful lawsuit to be an unfair labor practice, "[t]he resulting inhibition [on filing the lawsuit] * * * is far less chilling than the prospect of facing a private treble-damage suit" under the antitrust laws).

Even if the Board does issue a complaint, the costs of defending against the complaint predictably will be lower than the costs of defending against a private antitrust action. In recognition of "the cost and inconvenience [of] full discovery," the Board's rules do not provide for discovery comparable to that allowed under the Federal Rules of Civil Procedure. *P.S.C. Res., Inc.* v. *NLRB*, 576 F.2d 380, 386 (1st Cir. 1978). The Board permits "little prehearing discovery" after the issuance of a complaint by the General Counsel, *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978), and that which is allowed is solely for the purpose of obtaining and preserving evidence for trial. See *Title Guarantee Co.* v. *NLRB*, 534 F.2d 484, 487 (2d Cir.), cert. denied, 429 U.S. 834 (1976); 29 C.F.R. 102.30-102.31; *David R. Webb Co.*, 311 N.L.R.B. 1135 (1993).

Also in contrast to antitrust litigation, the Board lacks authority to order exemplary damages as a remedy for an unfair labor practice. See 29 U.S.C. 160(c); *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10-12 (1940). Nor may the Board award full, tort-like compensatory or consequential damages for injury caused by an unfair labor practice. See *Farmer* v. *United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 304 (1977) (Board may not award damages for pain, suffering, or medical

expenses); *UAW* v. *Russell*, 356 U.S. 634, 643 (1958). Rather, the Board is authorized only to issue remedies that restore, insofar as possible, the status quo that existed before the unfair labor practice. See *Republic Steel Corp.*, 311 U.S. at 12-13; see also *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). In a case such as the instant one the Board restores the status quo by awarding the wrongfully sued party its attorneys' fees (but no other economic damages) upon a finding that a civil lawsuit constituted a violation of the Act.[15] See, *e.g.*, *Petrochem Insulation, Inc.* v. *NLRB*, 240 F.3d 26, 34-35 (D.C. Cir.), cert. denied, 122 S. Ct. 458 (2001); *Geske & Sons, Inc.* v. *NLRB*, 103 F.3d 1366, 1378-1379 (7th Cir.), cert. denied, 522 U.S. 808 (1997); see also *Bill Johnson's*, 461 U.S. at 747. Thus, under the NLRA there is no remedy with the same potential "chilling" power as the antitrust remedy of treble damages (plus attorneys' fees).

For all those reasons, the First Amendment petitioning right is protected in the NLRA context without the same immunity for non-frivolous but losing suits that *Professional Real Estate Investors* provides in the antitrust context. It is sufficient in the NLRA context that a potential plaintiff who files a suit with a retaliatory motive will have an opportunity to litigate the case to judgment if the suit is not baseless, and cannot be subjected to liability under the NLRA if the suit

[15] "The Court has repeatedly interpreted [the NLRA] as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan*, 467 U.S. at 898-899.

succeeds on the merits. See *Bill Johnson's*, 461 U.S. at 747.[16]

The policies underlying the NLRA, moreover, would be significantly compromised if the Board could not enforce Section 8(a) of the Act against employers or unions that, in retaliating against protected Section 7 activity, frame a non-frivolous (although unsuccessful) lawsuit. See *Bill Johnson's*, 461 U.S. at 740-741, 747, 749; see also pp. 18-20, *supra*. The threat that a retaliatory lawsuit poses to employees' statutory rights is not diminished merely because the suit was colorable. Indeed, a rule that colorability suffices to insulate a losing, retaliatory suit from NLRA liability would convey an especially chilling message to employees. By framing a non-frivolous legal claim, an employer or union could render the Board powerless to take remedial action even after the plaintiff has had its day in court and the retaliatory suit has failed on the merits. In that situation, the Board's powerlessness to award a make-whole remedy to the parties who defeated the retaliatory lawsuit would compound the coercive message sent by the retaliatory lawsuit itself. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("[A]ny

[16] The immunities afforded to plaintiffs under *Bill Johnson's* and *Professional Real Estate Investors* might be analogized to the "breathing space" rules (*NAACP* v. *Button*, 371 U.S. 415, 433 (1963)) established in other First Amendment contexts. See *Right of Access*, at 680. It is a familiar concept that the appropriate amount of "breathing space" around a First Amendment right depends upon the context. Compare *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) (establishing "actual malice" test to shield publisher from liability for defamation of public official in matters relating to official conduct), with *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (rejecting application of *New York Times* rule when allegedly defamed party is private individual).

balancing of [employers' First Amendment rights and employees' Section 7 rights] must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.").

2. The "retaliatory motive" requirement established by the Board and incorporated into the holding of *Bill Johnson's* further ensures consistency between the Board's enforcement of the NLRA and the First Amendment right of petitioning the courts. Contrary to petitioner's implication (see, *e.g.*, Br. 26), an unsuccessful plaintiff cannot be held liable for committing an unfair labor practice just because his suit failed. A losing lawsuit violates Section 8(a) *only* if brought with a motive to interfere with the exercise of protected Section 7 rights. See *Bill Johnson's*, 461 U.S. at 739, 747, 749. Therefore, the *Bill Johnson's* rule does not present a danger that litigants might be "penalized for merely * * * prosecuting a lawsuit." *Chambers*, 501 U.S. at 74 (Kennedy, J., dissenting) (quoting *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967)).

As the Board indicated in this case, it would be relevant to the Board's consideration of the plaintiff's motive that a lawsuit, even though ultimately unsuccessful, was not factually or legally baseless. See Pet. App. 61a ("utter absence of merit" to petitioner's claims under the Labor-Management Relations Act, 1947, 29 U.S.C. 187, supported an inference of retaliatory motive); see also *Petrochem Insulation, Inc.* v. *NLRB*, 240 F.3d 26, 32-33 (D.C. Cir.), cert. denied, 122 S. Ct. 458 (2001). The Board also considers a variety of other factors in determining whether a lawsuit was filed in

retaliation for the exercise of protected Section 7 rights. Those factors may include: whether the plaintiff made direct statements indicating anti-union animus, see Pet. App. 60a; *Braun Elec. Co.*, 324 N.L.R.B. 1, 3-4 (1997); whether the plaintiff has a history of hostility to protected union activity, see *Control Servs., Inc.*, 315 N.L.R.B. 431, 456 (1994); whether the plaintiff committed independent, contemporaneous unfair labor practices, see *Summitville Tiles, Inc.*, 300 N.L.R.B. 64, 66 (1990); whether the relief sought in the lawsuit was unreasonably broad, see *IAM, District Lodge No. 91*, 298 N.L.R.B. 325, 326 (1990), enforced, 934 F.2d 1288 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992); whether the lawsuit sought punitive damages, see *American Pac. Concrete Pipe Co.*, 292 N.L.R.B. 1261, 1262 (1989); whether the lawsuit was brought against parties whom the plaintiff knew or should have known did not participate in the allegedly unlawful conduct, see Pet. App. 60a; *Diamond Walnut Growers, Inc.*, 312 N.L.R.B. 61, 66 (1993), enforced, 53 F.3d 1085 (9th Cir. 1995); and the timing of the lawsuit in relation to the protected NLRA activity, see *Control Servs.*, *supra*. A plaintiff who litigates in good faith, and not to deter the exercise of protected rights, has little reason to fear that he might be held liable under the NLRA if his suit fails. See, *e.g.*, *Rondout Elec., Inc.*, 329 N.L.R.B. 957 (1999); *Bakery, Confectionery & Tobacco Workers Int'l Union, Local 6*, 320 N.L.R.B. 133 (1995).[17]

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[17] It should be noted, however, that in other contexts the NLRA sometimes holds both employers and employees accountable when they act, even in good faith, on a belief that later proved erroneous. See, *e.g.*, *NLRB* v. *Burnup & Sims, Inc.*, 379 U.S. 21, 23-24 (1964) ("controlling" consideration in action under Section 8(a)(1) is whether discharges of employees tended "to weaken or destroy" rights protected by Act, not whether employer acted in good faith);

3. Relatedly, amici Society for Human Resource Management and LPA, Inc. are incorrect in suggesting (Br. 28) that the completed-lawsuit standard of *Bill Johnson's* leaves an employer with no legal recourse if it believes a union is engaging in conduct that is unprotected by the NLRA. As explained, the Board could not award a defendant union attorneys' fees merely because the employer went to court and lost. The NLRA, moreover, affirmatively prohibits various forms of union misconduct. See 29 U.S.C. 158(b) and 158(e). If an employer believes itself aggrieved by such unlawful conduct, it may obtain review of the union's activity by filing a charge with the Board. With respect to certain categories of charges filed against a union, moreover, the Act requires the Board's General Counsel to seek interim injunctive relief in federal district court if, after investigation, the General Counsel has "reasonable cause to believe such charge is true and that a complaint should issue." 29 U.S.C. 160(*l*).

Chevron U.S.A., Inc., 244 N.L.R.B. 1081, 1085-1087 (1979) (employer may discipline employees for refusing to cross secondary picket line, whether or not employees were aware that picketing was unlawful).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

> **Right of employees as to organization, collective bargaining, etc.**
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * * .

3. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

> **Unfair labor practices by employer**
>
> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]

* * * * *

4. Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter * * * .